EX PARTE

April 22, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area*, WC Docket No. 08-49**

Dear Ms. Dortch:

Verizon's Petition for Forbearance in Cox's Service Territory in the Virginia Beach MSA (the "Petition") should be denied. As the filings made by Cavalier Telephone & TV ("Cavalier") and others in this docket make clear, granting Verizon forbearance would result in at best a duopoly, with unreasonable, discriminatory prices for both wholesale and retail customers. For this reason, Verizon's petition fails all three of the requirements for forbearance – that enforcement of the targeted regulation "is not necessary to ensure that the charges, practices, [or] classifications . . . are just and reasonable and are not unjustly or unreasonably discriminatory"; that enforcement "is not necessary for the protection of consumers"; and that forbearance "is consistent with the public interest." 47 U.S.C. § 160(a). Verizon's Petition, however, fails to satisfy the public interest requirement for additional, equally important reasons. As Cavalier has explained, granting Verizon's Petition would almost certainly cause Cavalier to exit the market. Cavalier offers an expansive set of services to a broad range of customers, including underserved, vulnerable individuals and institutions. The loss of these services to these customers – particularly during an economic crisis in which the Government is spending billions of dollars to provide broadband to these kinds of customers cannot possibly be in the public interest. Thus, as explained below, Verizon's Petition should be denied for these reasons as well.

The Public Interest Standard

While unreasonable and discriminatory rates that harm consumers necessarily preclude a finding that a forbearance grant is consistent with the public interest, the Commission must also look at additional factors before finding a grant of forbearance to be in the public interest.[1] The public interest analysis must take into account the "broad aims of the Communications Act."[2]

[1] In past forbearance orders, the Commission has suggested that if the first two prongs of the forbearance test are met, the public interest is necessarily served. This approach reads the public interest requirement out of the statute, which cannot be what Congress intended. *See, e.g., Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) (noting "the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect"); *Abourezk v. Reagan*, 785 F.2d 1043, 1057 (D.C. Cir. 1986) ("To preserve the significance of both sections, and the congressional intent that guided their adoption, the two sections must not be homogenized . . . ."), *aff'd*, 484 U.S. 1 (1987). Moreover, while a finding that "forbearance will promote competition among providers of telecommunications services . . . *may* be the basis for a Commission finding that forbearance is in the public interest" (47 U.S.C. § 160(b) (emphasis added)), the statute in no way precludes the Commission from considering the other factors that ordinarily inform its determination that a particular result is in the public interest.

[2] *In re Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 41 (2004) (quotation marks omitted) ("*Cingular-AT&T Wireless Order*"); *In re General Motors Corporation And Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 16 (2004) ("*News Corp.-Hughes Order*"); *In re Applications For Consent To The Transfer Of Control Of Licenses From Comcast Corporation And AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246, ¶ 27 (2002) ("*Comcast-AT&T Order*"); *In re Application Of EchoStar Communications Corporation, (A Nevada Corporation), General Motors Corporation, And Hughes Electronics Corporation (Delaware Corporations) (Transferors) And EchoStar Communications Corporation (A Delaware Corporation) (Transferee)*, Memorandum Opinion and Order, 17 FCC Rcd 20559, ¶ 26 (2002) ("*EchoStar-DIRECTV HDO*"); *In re Applications to Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Media One Group, Inc. Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order15 FCC Rcd 9816, ¶ 11 (2000) ("*AT&T-MediaOne Order*"); *In re Applications of VoiceStream Wireless Corporation or Omnipoint Corporation, Transferors, and VoiceStream Wireless Holding Company, Cook Inlet/VS GSM II PCS, LLC, or Cook Inlet/VS GSM III PCS, LLC, Transferees*, Memorandum Opinion and Order, 15 FCC Rcd 3341, ¶ 11 (2000); *In re AT&T Corp., British Telecommunications, PLC, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications*, Memorandum Opinion and Order, 14 FCC Rcd 19140, ¶ 14 (1999) ("*AT&T Corp.-British Telecom. Order*"); *In re Application of WorldCom, Inc., and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, ¶ 9 (1998) ("WorldCom-MCI Order").

Among other things, the Commission should look to preserve and enhance competition in relevant markets, accelerate private sector deployment of advanced services, and ensure a diversity of services to the public.[3] The Commission should also assess whether forbearance will affect the quality of communications services or will result in the provision of new or additional services to consumers.

Crucially important here, the Commission's consideration of the public interest should be guided by the recently enacted American Recovery and Reinvestment Act of 2009 (the "Recovery Act" or "ARRA").[4] That statute provides for more than seven billion dollars in grants and loans to stimulate the deployment of broadband to the "unserved," "underserved," "low-income, unemployed, aged, and otherwise vulnerable populations," as well as "schools, libraries, medical and healthcare providers, . . . and other community support organizations."[5] The purposes of the Recovery Act are, among other things, "[t]o preserve and create jobs and promote economic recovery" and "[t]o assist those most impacted by the recession."[6]

As discussed below, Cavalier is currently providing service to the "underserved," "low-income, . . . aged, . . . otherwise vulnerable populations," "schools, libraries, . . . healthcare providers, . . . and other community support organizations." It cannot be in the public interest to

[3] *See, e.g.*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 706 (providing for the deployment of advanced telecommunications capabilities).
[4] Pub. L. No. 111-5, 123 Stat. 115; *see e.g.*, *In re Applications For Consent To The Assignment And/Or Transfer Of Control Of Licenses Adelphia Communications Corporation, (And Subsidiaries, Debtors-In-Possession), Assignors, To Time Warner Cable Inc. (Subsidiaries), Assignees Adelphia Communications Corporation, (And Subsidiaries, Debtors-In-Possession), Assignors And Transferors, To Comcast Corporation (Subsidiaries), Assignees And Transferees Comcast Corporation, Transferor, To Time Warner Inc., Transferee Time Warner Inc., Transferor, To Comcast Corporation, Transferee*, 21 FCC Rcd 8203, ¶ 23 (2006) ("[T]he Commission considers . . . public interest harms [caused] by substantially frustrating or impairing the objectives or implementation of the Act *or related statutes*.") (emphasis added).
[5] ARRA § 6001.
[6] *Id.* § 3.

eliminate the services Cavalier provides to these individuals and institutions, when a central goal of the Government is to promote economic recovery by *increasing* services for them.

Cavalier's Services and the Customers It Serves

Cavalier is one of the last remaining CLECs serving residential customers in the United States. Moreover, Cavalier is the only CLEC remaining in Virginia Beach serving residential consumers in any meaningful numbers. Cavalier is also the only facilities-based competitive provider in the Virginia Beach MSA for traditional customers of plain old telephone service or "POTS" without high speed internet or cable. Cavalier provides unlimited long distance phone service in the Virginia Beach MSA at a price significantly lower than anyone else in the market, which is greatly valued by an otherwise underserved class of customer. Additionally, Cavalier offers a package of unlimited local and long distance phone service with 12 free calling features, coupled with high-speed Internet service enhanced with Google Apps for a non-promotional rate of $50/month. A similar bundle of services costs approximately $104 from Verizon and $115 from Cox. Cavalier is also the only provider in the Virginia Beach MSA that is using copper wire to bring low cost IPTV to residential and small business customers. These products and pricing schemes are unique; they are not replicated by Verizon or Cox.

Cavalier's services are specifically targeted to residential and business customers who might not otherwise qualify for service, inner-city customers for which Verizon is unlikely to upgrade its facilities, and cost conscious enterprise customers. Many of the communities that Cavalier serves for which Verizon is seeking forbearance are among the poorest in Virginia. For example, Cavalier has more customers in the **[Begin Confidential]**

[End Confidential], Virginia than in any other zip code in the MSA. In the last updated census (www.uscensus.com), 97 percent of the residents of this zip code were members of a racial minority, with a median household income of $20,000 and 40 percent of individuals under the poverty line. Cavalier's second-highest concentration of customers is located in the zip code **[Begin Confidential]** **[End Confidential]**, Virginia. 87 percent of the residents of this zip code are members of a racial minority, with a median household income under $20,000 and 37 percent of individuals under the poverty line. The average credit score of customers coming to Cavalier in the past 13 months indicates that **[Begin Confidential]** **[End Confidential]** in Hampton Roads.

Cavalier serves many low-income and "Section 8" housing projects in the Hampton Roads area. For example, Cavalier serves **[Begin Confidential]**

[End Confidential]

Cavalier also offers special deals for the senior citizens in Hampton Roads[7]—the customers least likely to "cut the cord" or be interested in high-end bundled packages. For

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[7] Cavalier's POTS plans for seniors in Assisted Living facilities include **[Begin Confidential]**

[End Confidential].

example, Cavalier offers service to fifty percent of the **[Begin Confidential]**

[End Confidential].

Moreover, Cavalier currently provides service to: **[Begin Confidential]**

[End Confidential]

<u>Granting Verizon's Petition Would Be Inconsistent with the Public Interest</u>

Cavalier is already fulfilling the Recovery Act's goals in the Virginia Beach MSA without even touching the stimulus money. Cavalier provides low-cost and innovative services to the "underserved," "low-income, . . . aged, . . . otherwise vulnerable populations," "schools, libraries, . . . healthcare providers, . . . and other community support organizations." And Cavalier is expanding its efforts into new markets. For example, Cavalier recently lit a new collocation site in Suffolk, Virginia—one of the poorest cities in Virginia.[8] To grant this Petition in the face of the Recovery Act would be nonsensical. This is not the time in America to diminish competition and broadband options for "those most impacted by the recession."

Granting the Petition would also harm the interests of consumers well beyond Cavalier's direct consumers. The family that cannot afford broadband or a home computer benefits from Cavalier's service at their local library or community center. And Cavalier employs a great number of people in the Virginia Beach area. Eliminating the inputs necessary for Cavalier to provide service would not "preserve and create jobs."

At the same time, requiring Verizon to unbundle its copper loop facilities is no disincentive for Verizon to invest in upgraded facilities; in fact quite the opposite is true. If Verizon upgrades its facilities to fiber, it is relieved of unbundling obligations. The unbundling obligations only encourage Verizon to invest in broadband.

Thus the cities most affected by Verizon's Petition have uniformly opposed it. Even before the extent of the current economic crisis was known, the cities of Chesapeake, Norfolk, Portsmouth, and Virginia Beach specifically noted some of the public interest harms that would

[8] Recently, the monopoly cable provider in Suffolk, Charter Communications, filed for bankruptcy. Suffolk is one of the areas that Verizon has not asked for forbearance in the petition at bar. Due to Verizon's gerrymandering of the Virginia Beach MSA and its exclusion of areas that have little or no competition, the consumers of Suffolk are particularly at risk for a Verizon monopoly since Charter is restructuring. It is clear that if forbearance is granted in the surrounding areas of Suffolk, Cavalier will be forced to leave Suffolk as well. Again, it is inconceivable that during an economic time where cable providers are filing for bankruptcy in certain markets that it would be in the public interest for forbearance to be granted and Suffolk residents to lose a competitor to the incumbent—one that happens to offer a low-cost broadband alternative.

be caused by granting Verizon's petition and forcing Cavalier to exit the market: "Cavalier's small business packages offer a 10-15% savings to consumers on average based upon comparable service offerings from Cox or Verizon. In a possible economic downturn, such a savings option is significant and an important option for our constituents."[9] Similarly, the City of Hampton stated that granting Verizon's Petition would mean "our businesses and local governments will be left with fewer choices – and in many cases, no effective competitive choices – to meet their telecommunications needs."[10]

***Do Not make the Omaha Mistake Again*.**

The last Commission's decision to eliminate loop unbundling in Omaha was wrong. Specifically, the Commission's predictive judgment in *Omaha* that market forces would compel Qwest — in complying with its § 271 obligations – to offer commercial pricing at reasonable rates was erroneous. In fact, Qwest has offered wholesale services only at special access rates, forcing at least one competitor to exit the market.[11] Qwest's actions following release of the *Omaha Forbearance* Order show that in a highly concentrated market, market forces associated with retail competition alone do not incentivize an incumbent to provide wholesale access to competitors on commercially reasonable terms.[12] The Commission should not repeat that

[9] Reply Comments of the Cities of Chesapeake, Norfolk, Portsmouth, and Virginia Beach, WC Docket No. 08-49, at 5 (FCC May 27, 2008).
[10] Reply Comments of the City of Hampton, WC Docket No. 08-49, at 7 (FCC June 9, 2008).
[11] *See* Letter from Andrew D. Lipman *et al.*, Counsel for McLeodUSA Telecommunications Services, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, at 5-6 (filed Nov. 12, 2007); Letter from William Haas, Vice President-Regulatory and Public Policy, PAETEC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 10, 2008); Letter from Andrew D. Lipman, Counsel for Affinity *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed June 30, 2008).
[12] *See* Letter from William Haas, Vice President-Regulatory and Public Policy, PAETEC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 10, 2008); *see also* Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed July 23, 2007).

mistake in Virginia Beach and should ensure that wholesale and retail customers are protected from Verizon's market power.[13]

Conclusion

The Commission correctly found Verizon's petition for forbearance in Virginia Beach to be inconsistent with the public interest more than a year ago. The only relevant circumstance to have changed is that, after Verizon's first Virginia Beach petition was denied, this country entered the worst economic crisis since the Great Depression.[14] Congress and the President thus passed the Recovery Act, making stimulating broadband deployment to underserved and vulnerable individuals and institutions a central priority. Granting Verizon's Petition would flatly undermine the goals of the Recovery Act, and it should be denied as inconsistent with the public interest.

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[13] There is ample evidence that Verizon wields its market power to the detriment of consumers. For example, the Virginia SCC recently indicated that Verizon's customer service in Virginia has been far from adequate. *See* Staff Report, "Revision of Rules for Local Exchange Telecommunications Company Service Quality Standards," Virginia State Corporation Commission, Case No. 2008-00047, dated May 27, 2009 (attached as Exhibit A). If Verizon faced significant competition, it could not survive in the market with this level of customer service. In addition, Verizon has *raised* many of its retail rates in the least year, belying it claim that customers are defecting to other carriers and technologies on the basis of price.

[14] Chris Isidore, *Why this is the worst recession, not a depression*, CNNMoney.com, Mar. 25, 2009, at http://biz.yahoo.com/cnnm/090325/032509_depression_comparisons.html?.&.pf=banking-budgeting ("The current recession is also more widespread than any other since the Depression. The Federal Reserve's readings show that 86% of industries have cut back production since November, the most widespread reduction in the 42 years the Fed has tracked this figure. What's more, every state reported an increase in unemployment this past December, the first time that has happened in the 32 years that records for unemployment in each state have been kept.")

Respectfully submitted,

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Counsel

cc: Scott Deutchman
Jennifer Schneider
Mark Stone
Nick Alexander